FILED
AUG 9 1956
JOHN T. FEY, Clerk

BRIEF FOR THE RESPONDENT IN OPPOSITION

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. 254

LYKENS HOSIERY MILLS, INC.,
Petitioner

v.

DWIGHT S. WILLIAMS CO., INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF THE CASE

Dwight S. Williams Co., Inc., the Respondent herein and Plaintiff below (hereinafter referred to as Williams) and its predecessors in business have been continuously engaged

in the selling of hosiery since prior to 1911 (13)[1]. Williams' socks are sold under its various trademarks signifying the railroad or train theme throughout the United States through wholesale distributors who in turn sell to retailers (14, 46).

Robert P. Steele & Co., a predecessor in business of Williams adopted and began using as a trademark for men's hosiery the pictorial illustration of a train in connection with the words "*The* RAILROAD *Sock*" sometime prior to July 1913 (45). The trademark "*The* RAILROAD *Sock*" has been continuously used by Williams since its adoption prior to July 1913 until the present time in connection with its sales of men's work socks (20, 45). Throughout this long period of continuous usage, Williams and its predecessors in business have used the mark in various ways, such as "*The* RAILROAD *Sock*" alone (13) and in combination with pictorial illustrations of trains, both modern and old types. In carrying out its train and railroad theme in connection with its sales of men's work socks, Williams has, since at least as early as 1950 and long prior to Defendant's entry into the field, used in association with its trademark "*The* RAILROAD *Sock*", both in packaging and advertising, various railroad and train insignia and pictorial illustrations, all of which emphasize the train and railroad theme carried out by Williams (24).

On July 10, 1913, Plaintiff's predecessor, Robert P. Steele & Co. applied for a copyright on the label it was then using which showed the pictorial representation of a train

[1] Unless otherwise indicated, all page references are to the printed Appendix to the brief of Appellant Dwight S. Williams Co., Inc. as printed for the use of the Court below.

and "*The* RAILROAD *Sock*", and on November 18, 1913, the United States Patent Office issued a Certificate of Copyright, No. 3424, covering said label (20, 21).

Williams is the owner of the following trademark registrations:

Registration No. 524,743, issued May 2, 1950, for THE RAILROAD SOCK and the pictorial representation of a modern locomotive and train (15).

Registration No. 584,507, issued January 12, 1954, covering the pictorial illustration of an older type locomotive and train (15).

Registration No. 600,543, issued January 4, 1955, for SOCK LINE OF THE NATION (18).

Registration No. 602,189, issued February 15, 1955, for THE RAILROAD SOCK.

All of the aforesaid registrations cover the respective marks for use by Williams in its sale of men's socks, and pertain to the general railroad and train theme used by Williams in the selling of its men's work socks.[2]

Williams and its predecessors in business have spent large sums of money in advertising and popularizing "*The* RAILROAD *Sock*" mark and in emphasizing the general

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[2] Copies of Williams registered marks follow Page 71 of the Appendix to the Brief of Appellant Dwight S. Williams Co., Inc. as printed for the use of the Court below.

train theme in connection with its sale of men's work socks (29).

Lykens Hosiery Mills, Inc., the Petitioner herein and Defendant below (hereinafter referred to as Lykens) has its manufacturing plant located in Marion, North Carolina and is engaged in the business of manufacturing and selling men's hosiery, including men's work socks (62, 63 and 65).

In the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name and style TRAINMAN with a pictorial illustration of a train (64). Williams, through its attorney, promptly notified Lykens of Williams' rights and trademarks and complained of Lykens use of the word TRAINMAN and the pictorial illustration of a train in connection with Lykens sales of men's work socks (33). Lykens has nevertheless continued to sell men's work socks on an expanding nationwide basis under the TRAINMAN name in packages bearing pictorial illustrations of trains (69).

On the trial of the case in the United States District Court for the Western District of North Carolina the trial court held that there was no infringement by Lykens and that Lykens was not guilty of unfair competition. This decision was properly reversed by the Court of Appeals for the Fourth Circuit.

ARGUMENT

The Court of Appeals Did Not Violate Rule 52

The first question Petitioner would have this Court review is whether the action of the Court of Appeals in re-

versing the decision of the District Court was violative of Rule 52 of the Federal Rules of Civil Procedure. The law is well settled on this point that the Court of Appeals had the clear right, and indeed the duty, to review the record on appeal and decide for itself whether there was infringement and unfair competition. *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.*, 161 F. 2d 22, certiorari denied 68 S. Ct. 73, 332 U.S. 766, 92 L.Ed. 351.

The District Court failed to give any consideration to Williams' long prior usage of marks and labels signifying a railroad or train theme, and the opinion of the Court of Appeals makes it clear that Williams is rightly entitled to "rather broad rights" [3] because of such long prior usage.

It is also evident from the opinion of the Court of Appeals that it regarded the District Court's finding of no similarity between the labels of the respective parties as "clearly erroneous" within the meaning of Rule 52 of the Federal Rules of Civil Procedure. The District Court opinion clearly states that the trial Judge based his finding not on the testimony of witnesses but entirely upon an ocular side-by-side comparison of the labels of the respective parties:

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence." (8) (See also 135 F. Supp. 213, 217).

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[3] Page 22 of Appendix to Petition.

On appeal by Williams to the Court of Appeals for the Fourth Circuit, the Court of Appeals quoted the foregoing passage from the District Court opinion with disapproval and stated:

> "With this we cannot agree.
>
> "We think the District Judge laid too much stress on the ocular comparison of the packages of Williams and Lykens, when laid side by side. The test here is not *solely* such a juxtapositional comparison. The whole background of the case must be considered. Yet we do find here striking similarity between the two packages, in which the socks of Williams and those of Lykens are sold, in color, shape and general pattern." [4]

After declaring that the District Judge laid too much stress on the ocular comparison of the packages of the respective parties when laid side by side, the Court of Appeals quoted with approval from the opinion of Circuit Judge Murrah in the case of *Aviick et al.* v. *Rockmont Envelope Co.* (C.A. 10, 1946), 155 F. 2d 568, 572-573:

> "It is contended that the trial court merely made a side by side visual comparison of the two specimens, and judged the question of infringement solely by the reaction of his trained mind to such comparison. It is not the distinguishing details manifest by ocular comparison in juxtaposition which determines confusing similarity, the text is more objective than that. It is the total effect produced by the designation in the mind of the ordinary purchaser exercising due care in the mar-

[4] Page 24 in the Appendix to the Petition.

ket place. A prospective purchaser does not ordinarily carry a sample or specimen of the article he knows well enough to call by its trade name, he necessarily depends upon the mental picture of that which symbolizes origin and ownership of the thing desired." [5]

It is submitted that the Court of Appeals rightly regarded the finding of lack of similarity between the respective labels to be clearly erroneous.

Mr. Justice Reed speaking for this Court in the case of *United States* v. *United States Gypsum Company et al*, 68 S. Ct. 525, 542; 333 U.S. 364, 395; 92 L. Ed. 746, rehearing denied 68 S. Ct. 788; 333 U. S. 869; 92 L.Ed. 1147, defined the intention of Rule 52a by declaring that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been commited."

This interpretation of Rule 52 of the Federal Rules of Civil Procedure has been followed by the Courts of Appeals for the various circuits. *Miles Shoes Inc.* v. *R. H. Macy & Co., Inc.* (C.A. 2, 1952), 199 F.2d 602, certiorari denied 73 S.Ct. 650, 345 U. S. 909, 97 L.Ed. 1345; *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.* (C.A. 7, 1947), 161 F.2d 22, certiorari denied 68 S.Ct. 73, 332 U. S. 766, 92 L.Ed. 351; *LaTouraine Coffee Co., Inc.* v. *Lorraine Coffee Co., Inc. et al.* (C.A. 2, 1946), 157 F.2d 115, certiorari denied 67 S.Ct. 189, 329 U. S. 771, 91 L.Ed. 663; *Azrick et al.* v.

[5] Pages 24 and 25 in the Appendix to the Petition.

Rockmont Envelope Co., 155 F. 2d 568 (C.A. 10, 1946.)

In *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.*, supra, at Page 25, the Court stated:

> "Just as a finding of the District Court is not conclusive where the evidence is by deposition—equally open to both Courts—so is the question presented by the use of trade names open to both lower and appellate Courts for their separate determination as to confusing similarity.
>
> We are of the opinion that not only is the factual question thus open to the appellate Court, but it is our unavoidable duty to examine the two trademarks or trade names or copyrights and decide the question of fact for ourselves."

Again, in *Miles Shoes, Inc.* v. *R. H. Macy & Co., Inc.*, supra, at Pages 602-603 the Court declared that:

> "Where the question of confusing similarity is based solely on the marks themselves, this Court has said that: '* * * we are in as good a position as the trial judge to determine the probability of confusion.'" (citing cases).

Petitioner's argument on Page 9 of the Petition that there is substantial evidence to sustain the findings of the District Court and that such findings cannot be said to be erroneous because the credibility of witnesses is within the province of the trier of facts is both misleading and untenable. There was no testimony as to the absence or presence of likelihood of confusion by ordinary purchasers and

the only evidence on this point is furnished by the labels and exhibits. The opinion of the District Court makes it very clear that its conclusion was not based on the testimony of witnesses, but was made only after "a careful and painstaking study of the label, the contents, markings, get up and the overall appearance of each". (8).

For the foregoing reasons it is submitted that the reversal by the Court of Appeals of the District Court was not violative of Rule 52 of the Federal Rules of Civil Procedure.

The Decision Is Not In Conflict With Other Decisions

The next question which Petitioner would have this Court consider is whether the decision of the Court of Appeals for the Fourth Circuit in this case is in conflict with the decisions of the various other Courts of Appeals. The large number of cases from other circuits cited in the opinion of the Court of Appeals make it clear that its decision in this case is not in conflict with decisions of other Courts of Appeals.

The cases noted on Pages 10 and 11 of Petitioner's Brief wherein certain marks were held not to infringe certain other marks are not at all pertinent to this case. In the first place, there is no indication as to the nature of the goods upon which the respective marks are used, and secondly most of the marks noted do not appear to have any particular significance.

It is the striking similarity between the significance of the word RAILROAD as used by Williams and the word

TRAINMAN as used by Lykens which compelled the Court of Appeals to reverse the District Court in this case. In contrast to the marks noted on Pages 10 and 11 of the Petition, attention is invited to the marks contained in the opinion of the Court of Appeals wherein a similarity in significance was found to be such as to render the marks confusingly similar.[6]

Petitioner argues on Page 11 of the Petition that:

> "The effect of the decision of the Court of Appeals is two-fold: (1) To ignore completely the existence of at least twenty-three (23) prior registered trademarks dealing with wearing apparel (Plaintiff's Exhibit 7, R., p. 15) containing a pictorial illustration of a train or in some way related to trains; (2) to grant Plaintiff the exclusive right to a pictorial representation of a train that has been and is *publici juris*."

As to Item 1, the alleged use by others of the pictorial illustration of a train, as set forth by Petitioner, is contrary to fact and completely misleading. No evidence was presented at the trial to show any such use by other concerns *in connection with men's hosiery*. The trademarks "*The* RAILROAD *Sock*" and the pictorial illustration of a train are used by Williams on socks for men, and Williams does not claim any rights to this or similar marks for goods of different descriptive properties.

The twenty-three prior registered trademarks noted by Petitioner were cited in Petitioner's Answer to the Complaint, but these registrations were never offered in evidence

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[6] Pages 23 and 24 in the Appendix to the Petition.

by Lykens. In fact, status copies of these registrations were placed in evidence by Williams (Plaintiff's Exhibit 7, R. p. 15) and it was noted at the trial that out of the entire group of registrations only six remain unexpired and these did not relate to hosiery and no proof was offered with respect to their present usage. Only one of the twenty-three registrations cited by Lykens related to hosiery and that registration expired some twenty-five years ago.

As to Item 2, Petitioner's attempt to argue that Plaintiff's trademark is *publici juris* is simply not supported by the facts. The District Court did not make such a finding and Defendant did not file a cross appeal on this point. The word RAILROAD is completely arbitrary as applied to men's socks and is not in any way descriptive of the goods with which the mark is used by Williams. Therefore, the cases relied upon by Petitioner[7] to show that the Courts refuse to grant monopolies on words within the public domain because descriptive of the goods to which they are applied are not at all pertinent to the instant case.

It is accordingly submitted that the decision of the Court of Appeals is not in conflict with the decisions of other Courts of Appeals.

The Decision Is Not In Conflict With Decisions of This Court

The third and last question presented by the Petitioner is whether the decision of the Court of Appeals in this case is in conflict with the decisions of this Court. Only one

[7] Page 13 of the Petition.

decision of this Court is cited by Petitioner in suppo its contention that a writ of certiorari should be grant this ground. The cited decision is the case of *Misha Rubber Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 62 1022, 86 L.Ed. 1381[8], wherein this Court reversed the Court and held for Plaintiff on the measure of dam while specifically declining to disturb the lower C finding of infringement. Accordingly, this case is benefit to Petitioner.

The Court of Appeals for the Fourth Circuit relied a number of prior decisions of this Court in reachi holding of infringement and unfair competition by L Among the cases cited by the Court of Appeals are: *waka Rubber Co.* v. *S. S. Kresge*, 316 U. S. 203, 62 1022, 86 L.Ed. 1381[9]; *United Drug Company* v. *Th Rectanus Company*, 248 U. S. 90, 39 S.Ct. 48, 63 141[10]; *Hanover Star Milling Company* v. *Metcalf*, 240 403, 36 S.Ct. 357, 60 L.Ed. 713[11]; and *McLean* v. *Fl* 96 U. S. 245 and 24 L.Ed. 828[12].

Rather than being in conflict with the decisions o Court, the decision of the Court of Appeals is clea accord with such decisions.

It is accordingly submitted that Petitioner has mis showing that the decision of the Court of Appeals conflict with the decision of this Court.

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[8] Page 14 of the Petition.

[9] Page 22 of Appendix to Petition.

[10] Page 21 of Appendix to Petition.

[11] Page 21 of Appendix to Petition.

[12] Page 21 of Appendix to Petition.

CONCLUSION

Upon the facts hereinabove outlined and for the reasons herein set forth, the Respondent prays that the Petition for Writ of Certiorari be denied.

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